

District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance

Student Hearing Office

Terry Michael Banks, Due Process Hearing Officer

1150 - 5th Street, S.E.

Washington, D.C. 20003

(202) 698-3819

Facsimile: (202) 698-3825

Tmbanks1303@earthlink.net

OSSE
STUDENT HEARING OFFICE
2009 SEP 23 PM 4: 26

Confidential

| | | |
|--|---|-----------------------------------|
| STUDENT, through the legal guardian¹ |) | Complaint Filed: July 31, 2009 |
| |) | |
| Petitioner, |) | Prehearing Order: August 30, 2009 |
| |) | |
| v. |) | Interim Order: September 20, 2009 |
| |) | |
| THE DISTRICT OF COLUMBIA |) | Hearing Date: September 25, 2009 |
| PUBLIC SCHOOLS |) | |
| |) | Docket No. |
| Respondent. |) | |
| |) | |
| Student Attending: |) | |
| |) | |

HEARING OFFICER'S DECISION

| | |
|--------------------------------|---|
| Counsel for Petitioner: | Domiento C.R. Hill, Esquire James E. Brown & Associates 1220 L Street, N.W. Suite 700 Washington, D.C. 20005 (202) 742-2000; Fax: (202) 742-2098 |
|--------------------------------|---|

| | |
|--------------------------|--|
| Counsel for DCPS: | Harsharen Bhuller, Esquire Office of the General Counsel, DCPS 825 North Capitol Street, N.E.; 9 th Floor Washington, D.C. 20002 |
|--------------------------|--|

¹ Personal identification information is provided in Appendix A.

Jurisdiction

This hearing was conducted in accordance with the rights established under the Individuals With Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

Introduction

Petitioner is a year-old student attending Maryland
On January 7, 2009, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) develop an annual Individualized Education Program ("IEP"), (2) develop an appropriate IEP, and (3) review an independent psychiatric evaluation. The due process hearing was convened on February 5, 2009. On February 15, 2009, this Hearing Officer issued a Hearing Officer's Decision ("HOD") concluding that (1) DCPS failed to develop a timely annual IEP for the 2008-2009 school year, but Petitioner had suffered no educational harm as a result of DCPS' having placed Petitioner in a full-time program in which he received all of the related services to which he was entitled at the beginning of the 2008-2009 school year: one hour of psychological counseling per week, (2) Petitioner suffered no harm from DCPS' failure to convene an MDT meeting to review Petitioner's independent Psychiatric Evaluation, and (3) Petitioner suffered no harm from DCPS' failure to develop an appropriate IEP, because he received all of the services to which he was entitled.

On July 31, 2009, Petitioner filed a Due Process Complaint Notice ("*Complaint*") alleging that DCPS failed to reevaluate Petitioner and provide extended year services ("ESY"). In Prehearing Order issued on August 30, 2009, the Hearing Officer determined the issues to be adjudicated as follows:

- DCPS' alleged failure to reevaluate Petitioner

Petitioner alleges that DCPS has failed to conduct an educational reevaluation ordered by a Multidisciplinary Team ("MDT") on April 23, 2009. DCPS asserts that it authorized Petitioner to obtain an independent psychoeducational evaluation on August 13, 2009.

- DCPS' alleged failure to provide ESY

Petitioner alleges that DCPS did not provide Petitioner the ESY prescribed in his IEP for the summer of 2009. DCPS further asserts that Petitioner cannot show that he has suffered educational harm as a result of DCPS' failure to provide ESY.

The due process hearing was convened on September 25, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

Record

Due Process Complaint Notice dated July 31, 2009
District of Columbia Public School's Motion to Dismiss and Response to Parent's Administrative Due Process Complaint dated August 14, 2009
Petitioner's Opposition to the District of Columbia Public School's Motion to Dismiss the Parent's Administrative Due Process Complaint Notice and the Petitioner's Motion for Judgment on the Pleadings dated August 18, 2009
Prehearing Order dated August 31, 2009
Interim Order dated September 20, 2009
Petitioner's Five-Day Disclosure dated September 2, 2009 (Exhibit Nos. 1-11)
DCPS' Five-Day Disclosure dated September 3, 2009 (Exhibit Nos. 1-3)
Attendance Sheet for hearing conducted on September 25, 2009

Witnesses for Petitioner

██████████ Educational Advocate, James E. Brown & Associates
Petitioner's Mother
Program Supervisor,

Witnesses for DCPS

None

Findings of Fact

1. Petitioner is a year-old student attending
2. On April 23, 2009, DCPS convened an MDT meeting. The MDT prescribed 26.5 hours per week of specialized instruction, six hours per month of speech-language services, and four hours per month of behavior support services.³ The MDT agreed that would conduct an educational evaluation within thirty days and prescribed extended year services ("ESY").⁴

² Testimony of

³ Petitioner's Exhibit ("P.Exh.") No. 6.

⁴ Petitioner's Exhibit ("P.Exh.") No. 7 at 3-4. Petitioner's advocate's notes confirmed that Phillips would conduct the educational evaluation. *Id.* at first page of advocate's notes.

3. Petitioner's last psychoeducational evaluation was conducted in May 2007.⁵

4. DCPS authorized Petitioner obtain an independent psychoeducational evaluation on August 14, 2009.⁶ The evaluation was completed on August 19, 2009.⁷

5. DCPS failed to provide Petitioner transportation for the first three weeks of ESY during the summer of 2009. Petitioner's mother elected not to send Petitioner to the fourth week of ESY.⁸

Conclusions of Law

Failure to Re-evaluate

The LEA must evaluate a child suspected of a disability in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.⁹ Once a child has been determined to be eligible for services, he or she must be reevaluated at least every three years.¹⁰

A psychoeducational evaluation of Petitioner was conducted in 2007, so a triennial re-evaluation was not yet required. Petitioner offered no evidence of any factual circumstances that justified accelerating the re-evaluation. Therefore, Petitioner failed to establish that Petitioner would or did suffer educational harm in the absence of a new educational evaluation.

Although the MDT on April 23rd ordered an educational evaluation, both the MDT meeting notes and Petitioner's advocate's meeting notes confirm that not DCPS, was to conduct the evaluation. Finally, DCPS authorized Petitioner to obtain an independent evaluation that was completed on August 19th, over a month before the hearing. The Hearing Officer concludes that there was no legal justification for the allegation that DCPS failed to re-evaluate Petitioner, and Petitioner's counsel was aware, long before the hearing, that no relief was warranted.¹¹

⁵ *Id.* at 1.

⁶ DCPS Exh. No. 2.

⁷ DCPS Exh. No. 3.

⁸ Testimony of Petitioner's mother and Ms. Miller.

⁹ 34 C.F.R. §300.304(c)(4).

¹⁰ 34 C.F.R. §300.303(b)(2).

¹¹ The Court may award a local education agency ("LEA") attorneys' fees against a parent's attorney if the attorney files a complaint or civil action that is frivolous, unreasonable, or without foundation, or for litigation maintained after it became groundless. 20 U.S.C. §1415(i)(3)(B)(i)(II). The Hearing Officer will not recommend an award of attorneys fees only because the second count of the *Complaint*, though fatally premature, was not frivolous.

Failure to Provide ESY

Petitioner offered uncontroverted evidence that DCPS failed to provide Petitioner transportation to the first three weeks of ESY. However, Petitioner offered no evidence as to any educational harm that resulted from the deprivation of these services. As DCPS argued validly, although ESY is prescribed to prevent academic regression during the summer months, Petitioner's counsel filed the Complaint on the last day of ESY with no knowledge that Petitioner had suffered any such regression. Petitioner's counsel offered no evidence of regression at the hearing. Therefore, in the absence of proof of educational harm, Petitioner failed to establish a violation of IDEIA.¹²

ORDER

Upon consideration of Petitioner's request for a due process hearing, the parties' Five-Day Disclosure Notices, the testimony presented during the hearing, and the representations of the parties' counsel at the hearing, this 28th day of September 2009, it is hereby

ORDERED, that the *Complaint* is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED, that this Order is effective immediately.

Notice of Right to Appeal Hearing Officer's Decision and Order

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision may bring a civil action in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within ninety (90) days of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

/s/
Terry Michael Banks
Hearing Officer

Date: September 28, 2009

¹² *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006); *Catalan v. District of Columbia*, 478 F.Supp. 2d 73, 75-6 (D.D.C. 2007).